

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

w/ affidavit

75-4261

To be argued by
THOMAS H. BELOTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-4261

ANTOINE THUREL,

Petitioner,

—v.—

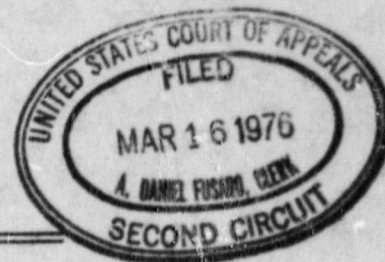
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.



ONLY COPY AVAILABLE

CASES CITED

	Page
<u>Aschaff v. Immigration and Naturalization Service</u> , 396 F.2d 391 (9th Cir. 1968).....	11
<u>Chao v. Tolson</u> , 383 F.2d 929 (7th Cir. 1967), cert. denied, 397 U.S. 838 (1969).....	6
<u>Hong Kai To v. Immigration and Naturalization Service</u> , 396 F.2d 759 (2d Cir. 1968), cert. denied, 399 U.S. 1003 (1968).....	6
<u>Lo v. Immigration and Naturalization Service</u> , 385 F.2d 759 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).....	6,8
<u>Quarles v. Immigration and Naturalization Service</u> , 403 F.2d 75 (9th Cir. 1969).....	12
<u>Sypolite v. Immigration and Naturalization Service</u> , 382 F.2d 98 (1st Cir. 1967).....	6
<u>Taniguchi v. Immigration and Naturalization Service</u> , 343 F.2d 315 (7th Cir. 1965).....	7
<u>Tena v. Immigration and Naturalization Service</u> , 379 F.2d 536 (7th Cir. 1967).....	6
<u>W. Thomas v. Kennedy</u> , 377 F.2d 819 (2d Cir. 1967).....	7
<u>Weland v. Immigration and Naturalization Service</u> , 390 F.2d 355 (2d Cir. 1974).....	8
<u>Wiatrak v. Immigration and Naturalization Service</u> , 413 F.2d 865 (2d Cir. 1969).....	6,7
<u>Winking v. Boyd</u> , 226 F.2d 385 (9th Cir. 1955).....	12
<u>Yarb v. Immigration and Naturalization Service</u> , 521 F.2d 194 (5th Cir. 1975).....	7,10,12

	Page
<u>Shen v. Immigration and Naturalization Service</u> , 400 F.2d 678 (9th Cir. 1968), cert. denied, 393 U.S. 1054 (1969)	12
<u>Song v. McGrath</u> , 339 U.S. 33 (1950)	13
<u>United States ex rel. Bolanz v. Immigration</u> , 206 F.2d 392 (2d Cir. 1953)	6
<u>Whitely v. Sperry</u> , 349 F.2d 775 (2d Cir. 1965)	7

ISSUE PRESENTED

WHETHER THE DECISION OF THE BOARD OF IMMIGRATION APPEALS AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF THUREL'S APPLICATION FOR WITHHOLDING OF DEPORTATION, WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

Presented for review is the Immigration and Nationality Act (INA), 8 U.S.C. 1101. Antoine Thurel petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board"), on October 29, 1973. That order dismissed an appeal from a decision of an Immigration Judge denying Thurel's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1101(a)(4)(A). The Board's decision is not supported by substantial evidence and therefore the Board's order affirming that decision should be reversed. This petition was filed December 1, 1973. Since that time the petitioner has enjoyed the automatic statutory stay of deportation which accompanies a petition for review under Section 1105 of the Act.

STATEMENT OF FACTS

The petitioner is an alien, a native and citizen of Haiti, who entered the United States on or about August 2, 1970 as a nonimmigrant visitor for pleasure authorized to remain in the United States until August 24, 1971. He failed to depart at the expiration of his authorized stay, and has continued to reside and work in the United States since that time and in violation of the law.

On January 7, 1974 after Thurel's apprehension, the Immigration and Naturalization Service (the "Service"), commenced deportation proceedings with the issuance of an order to show cause and notice of hearing charging that he was deportable from the United States under Section 241(a)(7) of the Act, 8 U.S.C. (132(a)(7)) (T 8).*

Thereafter, Thurel submitted an application for political asylum to the Service's Director. On February 7, 1974 Thurel was interviewed by the District Director's office with regard to his application for asylum. On March 5, 1974 the District Director requested an advisory opinion from the Department of State concerning the validity of Thurel's claim of anticipated persecution (T 11). That request was accom-

* References preceded by "T" are to the certified administrative record which has been filed with the Court.

passed by the affidavit which Thurel had submitted to substantiate his claim. On July 18, 1974 the Department of State responded to that inquiry stating that there was no reason to believe Thurel should be exempted from regular immigration procedures. The Department of State also advised they were unable to conclude that Thurel would suffer the persecution he alleged (T-10). The District Director apparently concurring did not grant the petitioner's request for asylum.

On August 11, 1974 the petitioner appeared before the Immigration Judge, wherein the alien was represented by counsel. Thurel conceded his departure from his native country was voluntary, but he applied for the withholding of deportation pursuant to Section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1521). During the hearing, testimony was given by Thurel and his cousin in an attempt to substantiate the alien's claim of anticipated persecution. In response to Thurel's application for Section 243(h) relief, the Service trial attorney offered into evidence the advisory opinion obtained by the District Director from the Department of State in response to his inquiry regarding Thurel's request for political asylum.

On August 13, 1974 the Immigration Judge rendered a decision denying the alien's application for withholding

deportation under Section 243(b) of the Act, finding that Thurel had failed to sustain his burden of establishing that he would be subject to persecution within the meaning of that provision of the Act (1.5). The Immigration Judge granted Thurel the privilege of voluntary departure in lieu of enforced deportation pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). On August 22, 1974 the petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T.1). On October 29, 1974 the Board affirmed the findings of the Immigration Judge and dismissed the appeal (T.4).

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253:

(4) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATION

Title 8, Code of Federal Regulations (C.F.R. §242.17)
242.17 Ancillary matters, applications

ONLY COPY AVAILABLE

(c) Temporary withholding of deportation. The respondent shall be advised that pursuant to Section 243(b) of the Act, any alien for temporary withholding of deportation to the country or countries specified by the special inquiry officer may be granted not more than ten days in which to submit his application. The application shall consist of a statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such relevant evidence as he is able to procure. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed.

APPENDIX

FOOTNOTES

THE ATTORNEY GENERAL SHALL NOT ABUSE HIS DISCRETIONARY AUTHORITY IN DENYING PERMANENT RESIDENCY FOR TEMPORARY WITHHOLDING OF DEPORTATION

A. General Background

Section 243(b) of the Act, 8 U.S.C. §1253(b), authorized the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment

and opinion of the Attorney General or that of his duly authorized delegate * Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Balanz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 835 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, the Circuit has determined that only where there is a clear probability of persecution to the particular alien is the discretionary authority to be favorably exercised.

Cheong Kai Po v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Hypollite v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967), Long v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

ONLY COPY AVAILABLE

In examining the Board's exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muskardin v. Immigration and Naturalization Service, *supra*; Paut v. Immigration and Naturalization Service, 521 F.2d 194 (5th Cir. 1973); Andrich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 713 (2d Cir. 1966); Vardian v. Esperdy, 197 F. Supp. 951 (S.D.N.Y. 1961), *aff'd.*, 303 F.2d 279 (2d Cir. 1963).

Accordingly, the issue before the Court is whether the Attorney General had abused his discretionary authority by denying the alien's application for withholding of deportation. Li Cheung v. Esperdy, 377 F.2d 819 (2d Cir. 1967); Kladis v. Immigration and Naturalization Service, 343 F.2d 515 (7th Cir. 1965).

ONLY COPY AVAILABLE

- B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien.

Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that he would be subject to persecution. MacCauley v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974).

Thurel's contention that he would be subject to persecution should he return to Haiti is based on the allegation that he had been associated during the period of 1956 until 1963 with political figures whose associates were persecuted by the

Haitian government then in power. To support this, Thurel testified that he had been "active" in the 1957 election which brought Duvalier to power. Subsequent to that election, he participated in a secret group which passed out leaflets opposing the Duvalier government. Nonetheless, he testified that he had never been arrested or questioned by the police.

Thurel also bases his request for political asylum in part on fear of action that will be taken against him because of his association with Josue Jean Baptiste, his second cousin. Mr. Baptiste testified that he had been elected to parliament in 1957. He had been "known" to be "against Duvalier", had left Haiti around 1961, returned briefly in 1963 and now resides in New York City. He apparently left Haiti without incident after his brief visit in 1963.

In rendering his decision the Immigration Judge stressed the dearth of credible evidence to support the petition. The Immigration Judge pointed out that Thurel had not been subjected to any mistreatment whatsoever during the sixteen or eighteen years he lived in Haiti subsequent to the events he described. The Immigration Judge also noted the brief presence of Baptiste in Haiti in 1963.

It is respectfully submitted that the decision of the Immigration Judge affirmed by the Board of Immigration Appeals is supported by the record in these proceedings. The record reflects that Thurel or his family have never been harmed as a result of his alleged political activities or associations. His claim that he fears politically motivated reprisals for his associations twenty years ago does not appear credible in the light of the long period of time subsequent to the activities during which he lived in Haiti without incident. Nor does the fact of Baptiste's remaining in Haiti until 1961 (four years after the election) seem consistent with their claim that association with him by Thurel would put the petitioner in danger.

The fact remains that Thurel, despite his alleged political activities remained in Haiti without harm for many years to himself or his family. He was able to obtain travel documents from his homeland in order to visit the United States. Nothing in the record of proceedings indicates that Thurel is on a proscribed list, or was required to flee from Haiti. Compare Paul v. Immigration and Naturalization Service, supra. Instead, the record of proceedings in this case indicates that Thurel has merely overstayed his non-immigrant visitation and now seeks to circumvent normal immigration procedures by the utilization of the

provisions of Section 243(b) of the Act. It is respectfully submitted that the petitioner has failed to substantiate his self-serving and conjectural testimony with any credible evidence indicating that there exists a clear probability of persecution in this case. It is therefore submitted that the Board of Immigration Appeals correctly affirmed the findings of the Immigration Judge.

- C. The Immigration Judge did not err in admitting into evidence the advisory opinions obtained from the Department of State.
-

The petitioner contends that the State Department's advisory opinion has not evidentiary value and should be removed from the record. It is noted that the petitioner did not object to the introduction of this document at the deportation hearing below (T. 7, p. 7). Furthermore, the Immigration Judge specifically noted that he did not intend to be guided by the conclusions contained therein except insofar as he might reach the same conclusion from evidence introduced at the hearing itself.

With respect to the introduction of that advisory opinion at the deportation hearing where Thurel's claim was considered "de novo", it is submitted that the Department of State's opinion "came from a knowledgeable and competent source" and were therefore admissible at the hearing. Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1959). See also 8 C.F.R. § 242.14(c). Such letters have been held

admissible, Paul v. Immigration And Naturalization Service,
supra, at p. 199; Hosseinmardi v. Immigration and Naturalization
Service, 405 F.2d 25 (9th Cir. 1969); Sheng v. Immigration and
Naturalization Service, 400 F.2d 678 (9th Cir. 1968), cert.
denied, 393 U.S. 1034 (1969); c.f. Namkung v. Boyd, 226 F.2d
385 (9th Cir. 1955), even though their quality may be questioned.
Hosseinmardi, supra. The letter was certainly of probative
value and the fact that the Immigration Judge's findings coincide
with the opinion of the Department of State appears to be the
result of the petitioner's own failure to supply any credible
or substantiated evidence in rebuttal to its conclusions. Finally
it is noted that the Immigration Judge was not guided by the
conclusions of the Department of State but rather reached his
own independent conclusion based by the evidence introduced at the
hearing.

The Immigration Judge enjoyed the advantage of seeing
and hearing the petitioner and his cousin, and was in the best
position to determine the accuracy, reliability and truthfulness
of the testimony. His evaluation thereof is entitled to great
weight. Kokkinis v. District Director, 429 F.2d 938 (2d Cir.
1970); Sigurdson v. Landon, 215 F.2d 791, 796 (9th Cir. 1954).

ONLY COPY AVAILABLE

The deportation hearing complied with all the requirements of a fair hearing. Sung v. McGrath, 339 U.S. 33 (1950). The petitioner was represented by counsel and was given the opportunity to be heard and to introduce evidence and credible witnesses on his behalf. 8 C.F.R. § 242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be permitted to stand. If the petitioner's persecution claim was rejected twice in opinions of the Department of State, and again by the Immigration Judge when his contentions were heard de novo, it was not as a result of error on the part of the Immigration Judge but rather because the claim is frivolous.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE DISMISSED.

Dated: New York, New York

March 15, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,

Of Counsel.

AFFIDAVIT OF MAILING

CA 75-4261

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
2
15th day of March, 1976 s he served ~~a~~ copies of the
within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Kleefield, Esq.,
Suite 400,
100 West 72nd St.
New York, NY 10023

And deponent further says she sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this.

15th day of March, 19 76

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977